122-347

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. ~~536.~~ 267

THE WESTERN UNION TELEGRAPH COMPANY, PLAINTIFF IN ERROR,

vs.

WILLIAM PENDLETON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

FILED JULY 18, 1884.

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INDEX.

	Original.	Print.
Caption	1	1
Transcript from Shelby circuit court	1	1
Caption	1	1
Complaint	2	1
Demurrer to complaint	11	4
Order overruling demurrer	11	4
Answer	12	4
Demurrer to answer	17	6
Amended complaint filed	18	6
Order sustaining demurrer to answer	19	7
Judgment	19	7
Appeal allowed	20	7
Bond	20	7
Clerk's certificate	22	8
Assignment of errors	22	8
Notes of filing briefs, &c.	24	8
Opinion	26	9
Judgment	47	16
Petition for writ of error	48	16
Order granting writ of error	54	18
Bond	57	18
Citation	60	18
Service of citation	61	19
Clerk's certificate	62	20
Writ of error	64	20
Assignment of errors	65	21

JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 Supreme Court.

STATE OF INDIANA, *ss:*

Be it remembered that heretofore, to wit, on the 5th day of July, 1883, The Western Union Telegraph Company, by Joseph E. McDonald, John M. Butler, and Augustus D. Mason, its attorneys, filed in the office of the clerk of the supreme court of the State of Indiana a transcript of the record and proceedings of the Shelby circuit court, of said State, in a cause wherein said Western Union Telegraph Company was defendant and one William Pendleton was plaintiff, together with an assignment of errors endorsed thereon, which transcript and assignment of errors are in the words and figures following:

Pleas before the Honorable Kendall M. Hord, judge of the 16th judicial circuit of the State of Indiana, and, by virtue of his office,
judge of the Shelby circuit court, at a term thereof begun,
2 held, and continued at the court-house of the county of
Shelby, in the State of Indiana, on Monday, the 21st day of May, 1883.

Complaint for Penalty and Damages. Demand, $700.00.

WILLIAM PENDLETON
vs.
THE WESTERN UNION TELEGRAPH COMPANY.

Be it remembered that on the 1st day of June, A. D. 18—, the plaintiff in the above-entitled cause, by Adams and Hackney, attorneys, refiled in the office of the clerk of the Shelby circuit court a complaint against said defendant, which complaint is in the words and figures following, to wit:

Complaint.

STATE OF INDIANA, } *ss:*
Shelby County, }

In Circuit Court. May Term, 1883.

WILLIAM PENDLETON
vs.
THE WESTERN UNION TELEGRAPH COMPANY.

3 The plaintiff, William Pendleton, complains of the defendant, The Western Union Telegraph Company, and says that said defendant is an electric telegraph company and corporation organized and subsisting under the laws of the State of Indiana, with a line of wires within said State of Indiana, and from the city of Shelbyville, in Shelby county, State of Indiana, to the city of Ottumwa, in the State of Iowa, said defendant being now, and having been at the time hereinafter mentioned, engaged in telegraphing for the public; that on the 14th day of April, A. D. 1883, at the office of said company, within the city of Shelbyville aforesaid, at 35 min-

utes past 5 o'clock in the afternoon of said day, being within the usual office hours of said company at said office, the plaintiff left with the agent of defendant, who received the same at the time and place aforesaid, a telegram for transmission from said city of Shelbyville to said city of Ottumwa, which telegram was in the 4 words and figures following, to wit:

"Ap'l 14th, 1883.

"To Rosa Pendleton, care of James Harker, near city grave-yard, Ottumwa, Iowa:

"Have you shipped things? If not, don't ship. Answer quick.

"WILLIAM PENDLETON."

That upon the delivery of said message to said agent plaintiff paid to said agent the full fees and charges required by def't for the proper transmission and delivery of said telegram from said Shelbyville to said Ottumwa, to wit, the sum of sixty cents.

Plaintiff avers that without his fault, negligence, or interference the said defendant, after transmitting said message to said city of Ottumwa, where the same was received by said company at 7.30 o'clock p. m. of said 14th day of April, 1883, did wholly fail and neglect to deliver said message to said Rosa Pendleton or to said 5 James Harker, whereby plaintiff sustained damage and defendant became liable for the sum of one hundred dollars penalty, as provided and fixed by the statutes of Indiana, and for which plaintiff demands judgment.

The plaintiff, William Pendleton, for second paragraph of complaint against the defendant, The Western Union Telegraph Company, says said defendant is an electric telegraph company and corporation organized and subsisting undert he laws of the State of Indiana, with a line of wires within said State of Indiana, and from the city of Shelbyville, in Shelby county, State of Indiana, to the city of Ottumwa, in the State of Iowa, said defendant being now, and having been at the time hereinafter mentioned, engaged in telegraphing for the public; that on the 14th day of April, A. D. 1883, at the office of said company, within the city of Shelbyville, aforesaid, at 35 minutes past 5 o'clock in the afternoon 6 of said day, being within the usual office hours of said company at said office, the plaintiff left with the agent of defendant, who received the same at the time and place aforesaid, a telegram for transmission from said —— of Shelbyville to said city of Ottumwa, which telegram [is] in the words and figures following, to wit:

"Ap'l 14th, 1883.

"To Rosa Pendleton, care of James Harker, near city grave-yard, Ottumwa, Iowa:

"Have you shipped things? If not, don't ship. Answer quick.

"WM. PENDLETON."

That upon the delivery of said message to said agent, plaintiff paid to said agent the full fees and charges required by defendant

for the proper transmission and delivery of said telegram from said
Shelbyville to said Ottumwa, to wit, the sum of sixty cents. Plaintiff
avers that the said Rosa Pendleton, to whom said message
7 was addressed, was and is the wife of this plaintiff; that prior
to the sending of said message he contemplated a removal
of his family and household goods from said city of Ottumwa to
said city of Shelbyville, and had directed his said wife to cause his
said household goods to be shipped to said Shelbyville, but that
on said 14th day of April he made a contract with one Peter ——, of
——, in the State of Kansas, to prospect for coal in said State
by boring and sinking shafts to the extent of one hundred feet
beneath the surface of the ground, at such points as said Peter
—— might direct; that the price agreed upon between said
Peter —— and the plaintiff for said labor and use of plaintiff's
implements for the execution of said labor was five dollars
per foot; that in excess of the cost and expenses of executing said
labor the plaintiff would have realized a profit of three dollars and
50 cents per foot; that as a part of said contract it was
8 agreed between plaintiff and said —— that plaintiff should
commence the said prospecting on or before the first
day of May, 1883, or said contract should be void. Plaintiff avers
that in pursuance of said contract, and to avoid the removal of his
said household goods and his family from said Ottumwa to said
Shelbyville, and the expenses incident thereto, the said telegram was
sent by plaintiff to his said wife, who could and would have retained
said household goods, and with his said family would have remained
at said Ottumwa; that defendant undertook to transmit and deliver
said message as addressed, but carelessly and negligently omitted to
deliver the same to Rosa Pendleton, or to said James Harker, in
whose care said telegram was addressed, although the same was
transmitted by said company and received by its agent at Ottumwa
at 7.30 o'clock in the evening of said 14th day of April, 1883;
9 that by reason of said careless and negligent omission to deliver
said message within a reasonable time after the same
was so received at said Ottumwa, the plaintiff's said wife continued
said contemplated removal without any knowledge whatever that
plaintiff's purpose had been changed by the contract aforesaid, or of said
telegram causing said goods to be shipped to said Shelbyville at an
expense for transportation of 25 dollars, and causing plaintiff's said
family to remove to said Shelbyville at an expense for railroad fare
of seventeen dollars and 50 cents. That the negligent failure to deliver
said message, as aforesaid, and the time required of plaintiff to await
the arrival of said goods at said Shelbyville, and cause their removal
back to said Ottumwa, or to procure a place at said Shelbyville for his
said family to reside, so detained plaintiff that he was unable to
reach said ——, in the State of Kansas, on or before said day
10 of May, 1883, and to execute the contract with said Peter
—— as aforesaid.

That the failure to deliver said message to said Rosa Pendleton, or the said James Harker, the shipment of said goods, the said removal of his family, the loss of the said contract with the said Peter ——, and the sum of said five hundred dollars, which would have [been] received under said contract, were all done and occasioned alone by the fault and negligence of said defendant, and without any fault or negligence whatever on the part of the plaintiff, and he alleges that by reason of the premises he has sustained damages in the sum of six hundred dollars, for which he sues and demands judgment, and for all other proper relief.

ADAMS AND HACKNEY,
Atty's for Plaintiff.

Afterwards, to wit, on the 29th day of May, 1883, that being the 8th judicial day of the May term of said court in said year, 11 before the honorable judge aforesaid, the following proceedings were had in said cause, to wit:

Came the parties, by their attorneys, and the defendant now files her demurrer to the complaint as follows, to wit:

Demurrer to Complaint.

State of Indiana, Shelby County Circuit Court.

William Pendleton
vs.
The Western Union Telegraph Company.

The defendant demurs separately to each paragraph of plaintiff's complaint, and assigns as a ground the following:

1st. That neither of said paragraphs of complaint state facts sufficient to constitute a cause of action against this defendant.

McDONALD, BUTLER AND MASON,
Att'ys for Def't.

Demurrer to Complaint Overruled & Exception Reserved.

Which Demurrer is by the court overruled; to which ruling the defendant at the time excepts. And the defendant now filed 12 her answer to the complaint as follows, to wit:

Answer to Complaint.

State of Indiana, Shelby County Cir. Court.

William Pendleton
vs.
The Western Union Telegraph Company.

Par. 1st. The defendant, for answer to plaintiff's complaint, denies every material allegation therein contained.

Par. 2d. Further answering plaintiff's complaint, defendant says that she admits the receipt of said telegram on April 4th, 1883, at 5 o'clock and 35 minutes in the afternoon, at her office in the town of Shelbyville, Indiana, as recited in the complaint. And defendant says that she transmitted said message described in the com-

plaint with impartiality and good faith and in the order of time in which it was received, promptly and without delay or negligence, to defendant's office in the city of Ottumwa, Iowa, to which
13 place said telegram was addressed, and that said message was
received at defendant's said office in the town of Ottumwa, Iowa, at 7.30 p. m. of said 14th day of April, being without delay or postponement out of its regular order.

Defendant further says that the said James Harker, in whose care said message was directed, lived more than one mile from the telegraphic station at the said Ottumwa, Iowa; that in accordance with the usual custom of said office at Ottumwa, Iowa, the said message was promptly and without delay placed in the post office of said town, with the proper stamp thereon and duly addressed; and defendant says that said telegram was received by the person to whom the same was addressed on the following morning, April 15th, 1883, about 9 o'clock a. m.

Par. 3. For further and separate answers to each paragraph of plaintiff's complaint defendant says that she admits that on
14 April 14th, 1883, at 5 o'clock and 35 minutes in the afternoon
of said day the plaintiff delivered to the operator at defendant's office, in the city of Shelbyville, State of Indiana, the said telegram mentioned in said first paragraph of complaint.

And defendant avers that the said telegram was transmitted, impartially and with good faith, in the order of time in which it was received and without postponement out of such order, to said city of Ottumwa, Iowa, to which said telegram was addressed.

And defendant says that said telegram was received at defendant's office, in said town of Ottumwa, in the State of Iowa, on the same day, to wit, April 14th, 1883, at 7.30 p. m., having been transmitted in its proper order, without delay or negligence, and in due time.

Defendant's further says that the duties and liabilities of telegraph companies within said State of Iowa, where said city of Ottumwa is located, and the transmission and delivery of all telegrams
15 within said State are regulated by a special statute passed by
the Legislature of said State of Iowa, which reads as follows, to wit:

Any person employed in transmitting messages by telegraph must do so without unreasonable delay, and any one who wilfully fails thus to transmit them, or who intentionally transmits a message erroneously, or makes known the contents of any message sent or received to any person except him to whom it is addressed, or to his agent or attorney, is guilty of a misdemeanour.

Section 1329. The proprietor of a telegraph is liable for all mistakes in transmitting messages made by any person in his employment, and for all damages resulting from a failure to perform any other duties required by law.

Defendant further says that after the receipt of said telegram at defendant's office, in said city of Ottumwa, Iowa, the same having been received in due order of time, without postponement, negli-
16 gence, or delay, the same was delivered to the person to whom
it was addressed without unreasonable delay and without in-

tentional error, and without any mistake in the transmission thereof in all respects, as required by the said laws of the State of Iowa.

Defendant further says that by the laws of the State of Iowa she is not required to deliver telegrams by messenger to the persons to whom the same are addressed; that within said city or town of Ottumwa, in the State of Iowa, defendant has established a certain district within which she delivers telegrams by messengers to the persons to whom they are addressed; that on the receipt of said telegram at said office in Ottumwa it was ascertained that the said James Harker, in whose care the same was addressed, did not reside within said delivery district, but did reside outside of the same, and more than one mile from defendant's said office. Defendant
17 says that, in accordance with the custom and usage of said office, and in order to facilitate the delivery of said message, a copy of said telegram was promptly placed in the post office of said city of Ottumwa, with the proper stamp thereon, and bearing the proper address.

And defendant further says that said telegram was delivered to the said person to whom it was addressed by 9 o'clock on the following morning, to wit, April 15th, 1883.

And defendant avers that in all things her said agents and employes at said town of Ottumwa complied with the laws of said State of Iowa in the delivery of said message.

McDONALD, BUTLER AND MASON,
Att'ys for Defendant.

Thereupon the plaintiff files his demurrer to the 2d and 3d paragraphs of defendant's answer herein as follows, to wit:

WILLIAM PENDLETON
vs.
THE WESTERN UNION TELEGRAPH COMPANY.

18 Comes now the plaintiff and demurs separately and severally to the 2d and 3d paragraphs of defendant's answer in the above-entitled cause, for the reason that neither of said paragraphs, separately considered, states facts sufficient to constitute a defence to plaintiff's complaint.

ADAMS AND HACKNEY,
Att'ys for Plaintiff.

Afterwards, to wit, on the 1st day of June, 1883, that being the 11th judicial day of the May term of said court, in said year, before the honorable judge aforesaid, the following proceedings were had in said cause, to wit:

Come the parties by their attorneys, and the plaintiff now withdraws his 2d paragraph of complaint, and now files his amended first paragraph of complaint as follows, to wit:

(The first paragraph of complaint is copied herein as amended.)

Thereupon the defendant refiles her demurrer to the com-
19 plaint as follows, to wit: (See page —, at line —, to page —, line —.)

Which demurrer is by the court overruled, to which ruling the defendant at the time excepts.

And defendant now refiles her answer to the complaint as follows, to wit: (See page —, line —, to page —, line —.)

And the plaintiff now refiles his demurrer to the 2d and 3d paragraphs of defendant's answer as follows, to wit: (See page —, line —, to line —.)

Which demurrer is by the court sustained, to which ruling and opinion of the court the defendant at the time excepts.

And the defendant now withdraws her first paragraph of answer herein, and elects to stand on said answer and refuses to answer over.

Whereupon the court renders judgment for plaintiff in the sum of one hundred dollars ($100.00).

To which the defendant excepts.

20 It is therefore considered and adjudged by the court that the plaintiff recover of the defendant, The Western Union Telegraph Company, the sum of one hundred dollars as and for his damages herein, together with the costs and charges by him in this behalf laid out and expended.

And the defendant prays an appeal from the judgment and decision of this to the supreme court of the State of Indiana, which is granted.

Thereupon the defendant files her appeal bond in the sum of two hundred dollars ($200.00), with John F. Wallick as surety, which bond is accepted and approved by the court, and reads as follows, to wit:

Appeal Bond.

Know all men by these presents, that we, Western Union Telegraph Company, as principal, and John F. Wallick, as surety, are held and firmly bound unto William Pendleton in the penal sum of
two hundred dollars; for the payment whereof, well and truly
21 to be made and done, we bind ourselves, our heirs, executors,
and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this first day of June, 1883.

Whereas the said William Pendleton, at the May term of the circuit court of the county of Shelby, in the State of Indiana, recovered judgment against said Western Union Telegraph Company for the sum of one hundred dollars and costs, and whereas the said Western Union Telegraph Company has appealed from said Shelby circuit court to the supreme court of the State of Indiana:

Now, therefore, the conditions of the obligation are to the effect following, to wit:

That if the said appellant will duly prosecute its said appeal and abide by and pay the judgment and costs which may be rendered or affirmed against it, then this obligation is to be void; otherwise to remain in full force and effect.

22 THE WESTERN UNION TELEGRAPH COMPANY,
By JOHN F. WALLICK, *Att'y-in-Fact.*
JOHN F. WALLICK.

Approved.

K. M. HORD, *Judge.*

Certificate of Shelby Co. Clerk.

STATE OF INDIANA, } *ss:*
Shelby County, }

I, Fred. H. Chuelden, clerk of the circuit court within and for said county, do hereby certify that the foregoing is a full, true, correct, and complete transcript of the record of proceedings, papers, and pleadings on file and judgment of said court in the above-entitled cause.

Witness my hand and the seal of said court, at Shelbyville, this 14th day of June, A. D. 1883.

FRED. H. SCHUEDEN,
Clerk Shelby Circuit Court.

Assignment of Errors.

THE WESTERN UNION TELEGRAPH CO. *vs.* WILLIAM PENDLETON.

23 The Western Union Telegraph Company, appellant, says that there is manifest error in the foregoing record, to wit:

1. The court erred in overruling appellant's demurrer to appellee's amended 1st paragraph of complaint, to which ruling appellant at the time excepted.
2. The court erred in sustaining appellee's demurrer to 2d paragraph of appellant's answer to amended 1st paragraph of complaint, to which ruling appellant at the time excepted.
3. The court erred in sustaining appellee's demurrer to 3rd paragraph of appellant's answer to amended 1st paragraph of complaint, to which ruling appellant at the time excepted.
4. The court erred in rendering judgment for appellee.

Wherefore appellant asks that said judgment be reversed.

McDONALD, BUTLER AND MASON,
Att'ys for Appellant.

24 And afterwards, to wit, on the 31st day of August, 1883, the appellant, by McDonald, Butler and Mason, its attorneys, filed its brief and argument in said cause as follows: (Here insert.)

Appellant's brief filed.

And afterwards, to wit, on the 10th day of September, 1883, came the parties, by their attorneys, and filed a written agreement to submit said cause to the court, as follows: (Here insert.)

Written agreement to submit cause to court filed.

And afterwards, to wit, on the 28th day of September, 1883, the appellee, by E. K. Adams and L. J. Hackney, his attorneys, filed his brief and argument in said cause as follows: (Here insert.)

Appellee's brief filed.

And afterwards, to wit, on the 5th day of October, 1883, the appellant, by McDonald, Butler and Mason, its attorneys, filed a brief and argument in reply to appellee's brief herein as follows: (Here insert.)

Appellant's reply—Brief filed.

And afterwards, to wit, on the 9th day of November, 1883, the appellant, by its attorneys, filed an additional brief herein as follows: (Here insert.)

Appellant's additional brief filed.

25 And afterwards, to wit, on the 25th day of January, 1884, the appellee, by Adams and Hackney, his attorneys, filed an additional brief and argument herein as follows. (Here insert.)

Appellee's additional brief filed.

And afterwards, to wit, on the 22d day of April, 1884, the same being the 128th judicial day of the November term, 1883, of said supreme court—present, the Hon. George V. Howk, chief justice; Hon. Byron K. Elliott, Hon. Allen Tollars, Hon. Edwin P. Hammond, Hon. William E. Niblack, associate judges—the following proceedings were had in said cause of—

THE WESTERN UNION TELEGRAPH COMPANY
vs.
WM. PENDLETON.
} No. 11,045

Appeal from the Shelby circuit court.

Came the parties, by their attorneys, and the court, being sufficiently advised in the premises, gave the following opinion and judgment pronounced, by Elliott, judge: 26

Opinion of Supreme Court of Indiana, Pronounced by Elliott.

Our statutes provides that a telegraph company with a line of wires wholly or partly within the State shall, during the usual office hours, receive despatches and, on payment or tender of the usual charges, according to the regulation of the company, transmit messages with impartiality and good faith, in the order in which they are received, and that, for a failure to perform this duty, shall be liable to a penalty of one hundred dollars, to be recovered by the person whose despatch is postponed or neglected.

The validity of this statute is contested upon the ground that it infringes the provision of the Constitution of the United States which invests Congress with power "to regulate commerce with foreign nations and among the several States." This position cannot, of course, be even plausibly maintained in cases where the line is wholly within the State, but in such cases the business is
27 purely domestic and not interstate, but here the line of the company extends beyond the State, and the message delivered to the company was undertaken to be transmitted to a point in Iowa.

The telegraph is an instrument of commerce. Intercourse by telegraph is commercial intercourse, and where it extends beyond the State is interstate, and subject to the control of Congress. Pensacola Tel. Co. *vs.* West, 96 U. S., 1; Telegraph Co. *vs.* Texas, 105 U. S., 460.

There is much conflict of opinion in the decisions of the court of last resort upon this subject, and it will be found to be no easy task to extract from the decisions well defined rules. The study of the many able opinions that have been delivered by our great judges, beginning with that of the great Chief Justice, John Marshall, is an interesting one, but we do not feel called upon to renew these
28 cases. Three theories seem to have been maintained: One, that the States cannot legislate upon the subject at all, whether Congress has or has not exercised the power vested in it. Another, that when Congress has exercised its power the States can adopt no valid legislation; and still another, that the States may legislate upon the subject, even though Congress has exercised the power vested in it by the Constitution. We think that the ultimate conclusion deducible from the later decisions is that the States cannot embarrass commercial communication, abridge the freedom of commerce, discriminate in favor of the products of one State, lay burdens upon the instruments of commerce, or exact licenses from persons, natural or artificial, engaged in interstate commerce, and that this is so, whether Congress has or has not legislated upon the subject. Gibbons *vs.* Ogden, 9 Wheat., 1; Brown *vs.* Maryland, 12
29 Wheat., 419; Wilson *vs.* Blackbird Creek Co., 2 Peters, 245; New York *vs.* Miln, 11 Peters, 102; Thurlow *vs.* Massachusetts, 5 How., 504; Passenger Cases, 7 How., 283; Cooley *vs.* Post Wardens, 13 How., 280; Penma *vs.* Wheeling Bridge Co., 13 How., 518; Smith *vs.* Maryland, 18 How., 71; Gilman *vs.* Phila., 3 Wall., 713; Case of State Freight Tax, 15 Wall., 232; Welton *vs.* State, 91 U. S., 275; Cook *vs.* Transportation Co., 97 *Id.*, 576; Weller *vs.* Virginia, 103 *Id.*, 344; Telegraph Co. *vs.* Texas, *supra.*

Accepting this conclusion as the law which rules our decision, we still have no hesitation in affirming that our statute is not borne down by it. No discrimination is made in favor of any person or in favor of any article of commence, the freedom of commercial intercourse is not abridged, and no new duty or burden is imposed upon the company. The statute secures to all alike the privilege of demanding that the duties of the corporation be performed with

diligence, impartiality, and good faith. It enforces an
30 existing duty, and provides a penalty, but it confines the duty to no class and denies the penalty to none. It is impossible to conceive the slightest restriction upon commercial intercourse, or the faintest discrimination in favor of any person or thing. Granting, then, the lack of power in the State to abridge the freedom of commerce and to discriminate in favor of men or things, we may still maintain that telegraph companies having offices and doing business in our State may be compelled to discharge their duties diligently and impartialty, because in requiring this a police power inherent in all sovereignties is rightfully exercised. We do not maintain that under the guise of a police regulation the State can abridge the freedom of commercial intercourse, or discriminate in favor of the products of one State, or grant commercial rights to the citizens of some particular State and deny them to others, but
31 we do maintain that the sovereign State has power to enact laws requiring persons, artificial or natural, doing business within its borders, to transact that business with fairness, diligence, and impartiality. A statute operating upon persons within the State, declaring an existing duty, adding neither new nor additional ones, usurps no functions of the Federal Congress and infringes no constitutional provision. We are not willing to concede that the police power inherent in all sovereignties is annihilated in all matters touching interstate commerce by the provisions of the national Constitution to which we have referred. On the contrary, we are satisfied that the power is not impaired or limited, except to the extent that it may not be exercised in such a manner as to abridge, embarrass, or interfere with the freedom of interstate commerce, or so as to violate valid Congressional legislation. The right to exercise the police power is not so abridged in as that it cannot be
32 exercised upon instruments or articles of commerce. It may be exercised even in commercial affairs, provided that it is not so exercised as to impose burdens or restrictions which limit or impede the free course of commerce. Sherlock *vs.* Alling, 93 U. S.
The police power is the right to regulate the enjoyment of prop-
99; County of Mobile *vs.* Kemball, 102 U. S., 691.
erty, to maintain public order, to secure the rights of citizenship, and to prevent injury to private rights. This power cannot be exercised within State limits by the Congress of the nation. U. S. *vs.* De Witt, 9 Wall., 41; U. S. *vs.* Reese, 92 U. S., 214; U. S. *vs.* Crinshank, 92 U. S., 542; Mann *vs.* People, 94 U. S., 113; Civil Rights Cases, 109 U. S., 1. The power of enacting laws upon this subject resides solely and exclusively in the States, and extends to all matters of personal and property rights within the States. A denial of the right
33 to legislate upon matters connected with commerce and its instrumentalities would result in evils of great magnitude. If there be no such power then the State cannot regulate the speed of railroad trains where the railroad line extends beyond the State, nor enact any law providing for the safety of passengers and the community; and if the States possess no such power then it has no existence, because by the conclusive adjudications of the highest

court the police power does not reside in Congress. The States must, and do, possess this power, even with respect to commercial affairs. True, the power is somewhat limited, but it nevertheless exists.

We assume that the power to enact laws declaratory of a duty exists, and it remains to determine whether our statute is a valid exercise of this sovereign power. In Mann *vs.* The People, 94 U. S., 113, the act of the Legislature of Illinois providing for the storage 34 and shipment of grain by warehousemen was held valid, and in speaking of the effect of the constitutional provision respecting commerce the court said of the warehousemen: "Incidentally they may become connected with interstate commerce, but not necessarily so. Their regulation is a thing of domestic concern, and certainly until Congress acts in reference to their interstate relations the State may exercise all the powers of Government over them, even though in so doing it may indirectly operate upon commerce outside of its immediate jurisdiction." The court in another case said: "Yet it is not everything that affects commerce that amounts to a regulation of it, within the meaning of the Constitution." State Tax Case, 15 Wall., 293. Strong language was used in City of New York *vs.* Miln, 11 Peters, 102, but we only have space for the following brief extract: "That all those powers which relate to 35 merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained, and that consequently, in relation to the authority of the State, is complete, unqualified, and exclusive." This language was used in case where the State law directly affected, and in a very material degree, foreign commerce. The case from which we have quoted and its principle has been applied in many instances; and among the cases furnishing a striking illustration of the rule declared, and of its application, is that known as the Slaughter-House Cases, 16 Wall. In the case of Cooley *vs.* The Board of Wardens, 12 How., 299, a State law requiring vessels to take pilots and prescribing a penalty for a breach of duty was held valid. The court sustained a State statute levying taxes upon articles of commerce in Woodruff *vs.* Partram, 8 Wall., 123. It was said of that stat- 36 ute, what may with truth be said of ours, that: "There is no attempt to discriminate injuriously against the products of other States nor the rights of their citizens, and the case is not, therefore, an attempt to fetter commerce among the States, or to deprive the citizens of other States of any privilege or immunity possessed by citizens of Alabama."

Judge Cooley says: "And it cannot be doubted that there is ample power in the legislative departments of the State to adopt all necessary legislation for the purpose of enforcing the obligations of railway companies as carriers of persons and goods to accommodate the public impartialty, and to make every reasonable provision for carrying with safety and expedition." Cooley Const. Law (5 ed.), 718. In Harrigan *vs.* Conn. River Co., 129 Mass., 580; S. C., 37 Am. Rep., 387, a statute prohibiting, except in a specified manner, the rafting of logs from another State through Massachusetts was held 37 valid, and this decision certainly goes much further than we

are required to do here. It has been held by this court in several cases that the statute may be enforced, although the message is received for transmission to another State, and if we should hold the law invalid we should be compelled to overrule these cases. Western Union Telegraph Co. *vs.* Dindley, 62 Ind., 371; Western Union Tel. Co. *vs.* Hamilton, 50 *Id.*, 181; Carnahan *vs.* Western Union Tel. Co., 89 Ind., 526. This doctrine has been asserted by other courts. Western Tel. Co. *vs.* Blanchard, 68 Ga., 299; S. C., 45 Am. Rep.; Auth. n. p., 486. It is true that in these cases the constitutional question was not argued, but it is, nevertheless, involved, and was necessarily decided. We are satisfied that the enactment of our statute was a legitimate exercise of the police power of the State, and that, as the statute infringes no provision of the
Constitution trenches upon no law of Congress, and does not
38 interfere with the freedom of interstate commerce, it is valid
and effective.

It is argued that, as the message was received for transmission to a point in Iowa, the place of performance is not in this State, and, therefore, our law cannot prevail. This argument rests upon an assumption that cannot be made good. The action is not for a breach of contract, but to recover a penalty given to the sender of a message for a breach of duty by the telegraph company. The argument of counsel is able and ingenious, but is plainly fallacious.

No question of the right to damages is involved; the single question is as to the right to recover a statutory penalty. Counsel are in error in asserting that there is conflict in our cases upon this subject. From first to last it has been steadily held that the statute is a penal one, awarding not liquidated damages, but a penalty.

It is also decided by these cases that the foundation of the
39 right is the contract with the corporation, but in none of
them is it intimated that the recovery is for damages for a breach of contract; on the contrary, all our decisions affirm that the recovery is for a penalty given by statute to a private individual. The Western Union Tel. Co. *vs.* Jones, 89 Ind., 596; Western Union *vs.* Adams, 88 *Id.*, 598; Western Union *vs.* Roberts, *Id.*, 377; Western Union *vs.* Gongar, 84 Ind., 176; Western Union *vs.* Rogers, 78 *Id.*, 169; Western Union *vs.* Axtell, 69 *Id.*, 199; Western Union *vs.* Dindley, 62 Ind., 371; Western Union *vs.* Ferguson, 57 *Id.*, 495; Western Union *vs.* Hamilton, 50 *Id.*, 181; Western Union *vs.* Buchanan, 34 *Id.*, 429; Western Union *vs.* Ward, 23 *Id.*, 377. The action given by the statute is for a penalty and the right to maintain it is in the sender of the message, who pays or tenders the compensation provided by the rules and regulations of the company.

The cases we have cited all proceed upon this theory, and it
40 is clear that under the provisions of the statute no other
theory could be correct. The English cases deny that the person to whom the message is sent can maintain an action for damages against the company, for the reason that there is no privity of contract. Dickson *vs.* Tel. Co., L. R., 2 C. P. D., 62. Playfair *vs.* Tel. Co., 4 Q. B., 706. The American cases, however, take a different view of the subject, for they hold that if the error occurs on

transmitting the message the person to whom the message is sent may maintain an action for damages; but while this is held it is conceded that the holding constitutes an exception to the general rule. Western Tel. Co. *vs.* Blanchard, 45 Am. Rep., 486*n;* 2 Wharton Contr., section 791; 17 Central Law Journal, 466; American Law Review, April, 1881. Wharton says that the better opinion is
that where the action is for non-delivery the sender only can
41 maintain the action. Our cases of Western Union Co. *vs.*
Meek, 49 Ind., 53; Western Union *vs.* Hopkins, *Id.*, 223, and Western Union *vs.* Fenton, 52 *Id.*, 1, were actions for damages based upon a statutory provision entirely different from that which gives the right to recover a penalty, and cannot be deemed in conflict with the decisions declaring the right of action for the penalty to be in the sender of the message. It is our settled conviction that our cases decide, and rightly decide, that the right to recover the penalty is in the sender of the message.

The statute operates in favor of the sender of a message delivered at an office in this State, and upon a corporation represented within our borders by its agents and officers. The parties are therefore within our jurisdiction. The duty which the statute assumes to enforce is one arising in Indiana, for it grows out of and is founded
upon an undertaking entered into in this State. The parties
42 and subject-matter being within our jurisdiction, they are
subject to our laws. Persons and property within the jurisdiction of a State are subject to the laws of that State.

The duty which the statutes seeks to enforce is owing here in Indiana and not elsewhere. It was here that the contract was made which imposed the duty on the telegraph company, and it was here that the failure occurred, for the message was not transmitted, as the law commands, in good faith, and with diligence and impartiality. The duty which the company failed to perform was not a duty owing in Iowa, but was a duty owing in Indiana where the parties executed the contract out of which the duty arose. The duty of the company did not end at the State line; it extended throughout the whole scope of the undertaking, and required the
message to be transmitted and delivered in good faith and
43 with reasonable diligence to the person to whom it was sent.
The breach of duty, no matter where the specific act constituting it occurred, was a breach here and not elsewhere. The duty is a general and continuous one, and if not performed the failure to perform, irrespective of the place where the failure occurred, is a breach of the duty at the place of its creation. There is not the slightest resemblance between such a case as this and cases of distinct and independent wrongs occurring wholly beyond the limits of the State, nor is there the remotest analogy between such a case as the present and the case of an attempt to enforce in one jurisdiction the laws of another State or nation. There is here no attempt to enforce the law of another State nor to enforce a penalty for a breach of a duty created by a foreign statute. The action is in
an Indiana forum to enforce a duty created by an Indiana
44 statute and arising out of an Indiana contract made by par-

ties within the State. We see no reason to depart from the rule laid down in the cases of Western Union Co. *vs.* Hamilton, 50 Ind., 181; Western Union *vs.* Dindley, 62 Ind., 371; Carnahan *vs.* Western Union, 89 Ind., 526, and we not only refuse to overrule them, but expressly and fully approve them. In holding as we do that our statute may be enforced, although the undertaking is to transmit the message beyond the State, we do not trench upon the doctrine that State laws have no extra territorial effect. What we hold is that the statute operates upon the parties and the subject-matter within our jurisdiction by enforcing the performance of a duty created here, owing here, and violated here.

If a telegraph company should show a positive statute of another
State commanding the delivery of messages in a certain man-
45 ner and different from that prescribed by our statute, then it
may perhaps be true that the company would make out a perfect defence by showing obedience to its commands. In such a case the defence would not be good for the reason that our statute is bad, but because of the rule that necessity is always an excuse, and a positive law enjoining a duty creates a necessity. However this may be, the defence in this case is not valid, for the reason that there is nothing in the Iowa statute which contravenes or impairs the statute of Indiana.

We have decided many times, as has been already shown, that our statute gives the right of action for the penalty to the sender of the message, and he can, of course, recover no other penalty than that prescribed by our statute. If the company should wrongfully violate the law of some other State, and be punished by the courts
of that State, the punishment would not be for a violation of
46 our law, but would be for a wrong committed against the law
of another jurisdiction, so that it is impossible that the punishment should be for one and the same offence.

Our statute does not give the right to the penalty because a specific act of negligence is committed, but gives the penalty to secure the performance of a duty which springs into existence when the contract is made. It is the breach of duty that is punishable, and not the particular act which constitutes the breach. Wherever the act which constitutes the breach of duty is committed, whether here or in a foreign jurisdiction, the duty is broken here where it came into being, and where it was owing, and should be discharged. A confusion of thought leads to a wrong conclusion, but this is cleared away when it is brought fully into view that the wrong consists in
the violation of duty, and that this violation takes place
47 where the duty exists, and where the one party owes it and
the other has a right to demand that it be neither violated nor omitted. There is no conflict of law and no clashing of jurisdiction, for where the duty is owing there it is violated by an act which constitutes a breach.

Mr. Thompson says:

"In an action to recover the statutory penalty for failure to transmit a message from an office in one State to an office in another, the fact that the act of negligence which prevented the message from reaching its destination occurred out of that State will not defeat a recovery in that State." 2 Thompson Negligence, 838.

It is therefore considered by the court that the judgment of the court below in the above-entitled cause be in all things affirmed, at the costs of the appellant; all of which is ordered to be certified to said court.

48 And it is further considered by the court that the appellee recover of the appellant the sum of —— ($) dollars and —— cents for cost and charges in this behalf expended.

And afterwards, to wit, on the 10th day of May, 1884, the appellant, by McDonald, Butler and Mason, its attorneys, filed its verified petition for a writ of errors herein as follows, to wit:

Appellant's Petition for Writ of Error.

In the Supreme Court of the State of Indiana.

WESTERN UNION TELEGRAPH COMPANY
vs.
WILLIAM PENDLETON.

To the Hon. George V. Howk, chief justice of the supreme court of the State of Indiana:

49 The Western Union Telegraph Company, appellant in the above-entitled cause, would respectfully show unto your honor that heretofore, to wit, on the — day of April, 1883, this court being the highest court of the State in which a decision in the above suit could be had, rendered a final judgment in said above-entitled cause—appeal No. 11045—said cause having been brought by the said William Pendleton originally in the Shelby circuit court, Shelby county, Indiana, against said Western Union Telegraph Company, judgment being rendered in said court against said Western Union Telegraph Company, an appeal having been taken and perfected by said Western Union Telegraph Company to this court.

50 Appellant further shows that said suit was brought to recover the statutory penalty of $100.00 given by the statute of Indiana for failure to transmit and postponement of a certain telegraph message delivered to the Western Union Telegraph Company at its office in Shelbyville, Indiana, for transmission to the city of Ottumwa, in the State of Iowa; that defendant demurred to plaintiff's complaint for the reason that the same did not state facts sufficient to constitute a cause of action, which demurrer was overruled, to which ruling of the court defendant at the time excepted; and that the defendant has, among its answers to the complaint for said penalty, set up the statute of the State of Iowa regulating the transmission and delivery of telegrams, and averred that within the limits of the State of Indiana the defendant had complied with the statute of the State of Indiana on said subject, and within the limits of the State of Iowa had complied with the said statute of the State of Iowa.

Appellant further says that in said suit there was drawn in
51 question the validity of the statutes of the State of Indiana
regulating the transmission and delivery of telegrams (R. S., §§ 4176, 4177, and 4178), on the ground of said statutes, in so far as they related to interstate telegrams, being repugnant to the Constitution of the United States.

And appellant says that question is shown by the said record in said cause, and by the final judgment aforesaid rendered by this court in said case. The decision of this court and the opinion rendered therein was in favor of the validity of said statute of the State of Indiana.

And appellant shows that there was also drawn in question, as appears more fully in the record of said cause, the right, privilege, and immunity, as claimed by said Western Union Telegraph Company under the Constitution of United States, to transmit interstate telegrams without restriction or interference, or regulation of
52 the same by the Legislatures of the various States.

And appellant says that the decision and opinion of the court, rendered as aforesaid in said cause, was against the right, privilege, and immunity thus claimed by appellant under said United States Constitution.

Wherefore appellant asks that a writ of error may be allowed by your honor issuing from the Supreme Court of the United States to the supreme court of the State of Indiana and its clerk, to the end that the record in this cause may be returned in due season by the clerk of said Indiana supreme court to the Supreme Court of the United States, in order that said cause and the questions arising in the record thereof may be re-examined, and reversed or affirmed in the Supreme court of the United States; and to the end that
53 said writ of error may act as a supersedeas in this cause,
appellant asks that your honor may fix the amount of the bond necessary for the same and approve the surety thereof, and also direct a citation to said William Pendleton, notifying him of the issuing of said writ of error.

WESTERN UNION TEL. CO.,
By McDONALD, BUTLER AND MASON,
Attorneys.

STATE OF INDIANA, }
Marion County. } *ss:*

Augustus L. Mason, being duly sworn, on oath says: That he is cognizant of the matters stated in the foregoing petition, and that the same are true as he verily believes.

AUGUSTUS L. MASON.

Subscribed and sworn to before me this 9th day of May, A. D. 1884.

H. L. GORDON,
Notary Public.

54 And afterwards, to wit, on the 13th day of May, 1884, the court, being fully advised in the premises, grant the petition

for a writ of error heretofore filed by appellant, and it is ordered as follows, to wit:

Petition for Writ of Error Granted, & Order of Court.

In the Supreme Court of the State of Indiana.

WESTERN UNION TELEGRAPH COMPANY *vs.* WILLIAM PENDLETON.

Entry.

The petition of the Western Union Telegraph Company, appellant, heretofore filed in this cause, showing that, as appears by the record in this cause, there is drawn in question the validity of a statute of the State of Indiana on the ground of said statute
55 being repugnant to the Constitution and laws of the United States, and that the final judgment and decision of this court heretofore rendered in this cause is in favor of the validity of said statute of the State of Indiana, and that a right, privilege, and immunity is claimed by the said Western Union Telegraph Company under the Constitution and statutes of the United States, and the final judgment and decision of this court heretofore rendered in this cause is against said right, privilege, and immunity specially claimed by said Western Union Telegraph Company under said Constitution and laws of the United States, all of which more fully appears in the record in this cause, coming on to be heard, the court finds that the allegations of said petition are true, and it is ordered that prayer of said petition be granted, and that a writ of error from the Su-
56 preme Court of the United States to this court may be allowed, upon which writ the questions involved in this case may be re-examined and reversed or affirmed in said Supreme Court of the United States, and a citation to be signed by the Honorable George V. Howk, chief justice of this court, is directed to be issued, and the said Western Union Telegraph Company now tenders its bond in the sum of five hundred ($500.00) dollars, with John F. Wallick as surety, conditioned that the said Western Union Telegraph Company shall prosecute said writ of error heretofore allowed to effect and answer all costs and damages which may be adjudged or awarded against it; and said bond, and the surety therein, is now approved by the Honorable George V. Howk, chief justice of this court, which bond, with said approval endorsed thereon, reads in the words and figures following, to wit:

57 *Appeal Bond.*

Supreme Court of the United States.

WESTERN UNION TELEGRAPH COMPANY *vs.* WILLIAM PENDLETON.

Know all men by these presents that we, The Western Union Telegraph Company and John F. Wallick, are held and firmly bound unto the above-named William Pendleton in the sum of five hundred dollars, to be paid to said William Pendleton; to which payment, well and truly to be made, we bind ourselves jointly and severally, and our and each of our heirs, executors, and administrators, jointly by these presents.

Sealed with our seals and dated the 9th day of May, 1884.

58 Whereas the above-named The Western Union Telegraph Company hath prosecuted an appeal to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the supreme court of the State of Indiana:

Now, therefore, the condition of this obligation is that if the aboved-named The Western Union Telegraph Company shall prosecute his said appeal to effect and answer all cost and damages that may be adjudged or awarded against him if he shall fail to make good his plea, then this obligation to be void; otherwise, in full force.

Sealed and delivered in presence of—
THE WESERN UNION TELEGRAPH CO., [SEAL.]
By JNO. F. WILLICK, *Att'y-in-Fact.*
JOHN F. WALLICK. [SEAL.]

Taken and approved by me this 13th day of May, 1884.
GEO. V. HOWK.

59 And afterwards, to wit, on the 14th day of June, 1884, the citation heretofore issued to appellee is returned with acknowledgment of service endorsed thereon as follows: (Here insert.)

Copy of writ of error filed.

And afterwards, to wit, on May 16th, 1884, came the appellant, The Western Union Telegraph Company, by its attorneys, McDonald, Butler and Mason, and filed in the office of the clerk of the supreme court a true copy of the writ of error hereto attached.

60 *Citation.*

United States of America to William Pendleton, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Indiana, wherein The Western Union Telegraph Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable George V. Howk, chief justice of the supreme court of Indiana, this 9th day of May, in the year of our Lord one thousand eight hundred and eighty-four.
GEO. V. HOWK, *C. J.*

61 Filed June 14, '84.
S. P. SHEERIN, *Cl'k.*

We hereby acknowledge service of the within citation, this 10th day of June, 1884.

ADAMS & HACKNEY,
Att'ys for Appellee.

62 *Clerk's Certificate.*

Supreme Court.

STATE OF INDIANA, *ss:*

I, Simon P. Sheerin, clerk of the supreme court of the State of Indiana, do hereby certify that the above and foregoing is a full, true, and complete copy of the transcript of the proceedings of the Shelby county Indiana circuit court in the case of The Western Union Telegraph Company *versus* William Pendleton, No. 11045, and a full, true, and complete transcript of the several orders of this court in said cause, as the same appears on file and of record in the office of the clerk of the supreme court aforesaid.

This copy is made in obedience to a certain writ of error directed by the Supreme Court of the United States to the supreme court of the State of Indiana, dated May 14th, 1884, requiring the 63 same, and is in full compliance with said writ, which is hereto attached, and is a full and complete return to the same.

Witness my hand and the seal of said court, at Indianapolis, this 20th day of June, A. D. 1884.

[Seal Supreme Court, State of Indiana.]

SIMON P. SHEERIN,
Clerk of the Supreme Court of the State of Indiana.

64 *Writ of Error.*

UNITED STATES OF AMERICA:

The President of the United States of America to the honorable the judges of the supreme court of the State of Indiana, Greeting:

Because on the record and proceedings, as also on the rendition of a judgment in a plea which is in the said Supreme Court, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Western Union Telegraph Company and William Pendleton, wherein was drawn in question the validity of a statute of said State of Indiana on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of such validity; and wherein was also drawn in question the construction of a clause in the Constitution of the United States, and the decision was against the right, privilege, and immunity specially claimed under such clause of said Constitution of the United States, a manifest error hath happened, to the great damage of the said The Western Union Telegraph Company, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid on this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 13th day of October next, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, this 14th day of May, A. D. 1884.

[Seal Circuit Court of the United States, District of Indiana.]

NOBLE C. BUTLER, *Clerk.*

65 *Assignment of Errors.*

In the Supreme Court of the United States.

THE WESTERN UNION TELEGRAPH COMPANY
vs.
WILLIAM PENDLETON.

The Western Union Telegraph Company, plaintiff in error, would show unto the court that there is manifest error in the above and foregoing record, in this, to wit:

1. The supreme court of the State of Indiana erred in affirming the judgment of the circuit court of Shelby county, in the State of Indiana.
2. The court erred in overruling appellant's demurrer to appellees' amended first paragraph of complaint; to which ruling appellant at the time excepted.
3. The court erred in sustaining appellee's demurrer to second paragraph of appellant's answer to amended first paragraph of complaint; to which ruling appellant at the time excepted.
4. The court erred in sustaining appellees' demurrer to third paragraph of appellant's answer to amended first paragraph of complaint; to which ruling appellant at the time excepted.
5. The court erred in rendering judgment for appellant.

Wherefore the plaintiff in error asks that said judgment of the supreme court of the State of Indiana may be in all things reversed.

JOSEPH E. McDONALD,
JOHN M. BUTLER,
Attorneys for Plaintiff in Error.

[Endorsed:] [In pencil:] (11045. Original writ of error.) Filed May 16, 1884. Simon P. Sheerin, clerk.

Endorsed on cover: Indiana supreme court. No. 536. The Western Union Telegraph Company, plaintiff in error, *vs.* William Pendleton. Filed 18th July, 1884.

122-347

APR 22 1887
JAMES H. McKENNEY,
CLERK.

SUPREME COURT
OF THE
UNITED STATES.

THE WESTERN UNION TELEGRAPH COMPANY, *Plaintiff in Error*, vs. WILLIAM PENDLETON, *Defendant in Error.*	*October Term, 1886.* No. 267.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

BRIEF IN BEHALF OF PLAINTIFF IN ERROR.

JOSEPH E. McDONALD,
JOHN M. BUTLER,
AUGUSTUS L. MASON,
Attorneys for Plaintiff in Error.

FRANK H. SMITH, PRINT., INDIANAPOLIS.

SUPREME COURT
OF THE
UNITED STATES.

THE WESTERN UNION TELEGRAPH COMPANY, *Plaintiff in Error,* vs. WILLIAM PENDLETON, *Defendant in Error.*	*October Term, 1886.* No. 267.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

BRIEF IN BEHALF OF PLAINTIFF IN ERROR.

I.

STATEMENT.

This action was commenced by William Pendleton, defendant in error, against the Western Union Telegraph Company, plaintiff in error, in the Circuit Court of Shelby County, Indiana. The complaint was in two paragraphs. The first paragraph was to recover a statutory penalty of one hundred dollars. (Rec. pp. 1 and 2.

The second paragraph of the complaint was subsequently withdrawn by the plaintiff. (Rec. p. 6.)

A general demurrer in statutory form was filed to the complaint, and assigned as the ground thereof, that neither of said paragraphs of complaint stated facts sufficient to constitute a cause of action. (Rec. p. 4.)

The first paragraph of the complaint was amended and the demurrer subsequently refiled to the complaint as amended. (Rec. p. 6.)

This demurrer was overruled by the Court to which ruling the defendant excepted. The defendant answered the complaint in three paragraphs.

(Rec. pp. 4 to 6 inclusive.)

The first paragraph of the answer, being a general denial, was subsequently withdrawn. (Rec. p. 7.)

The plaintiff demurred separately to each of the second and third paragraphs of the answer, for want of facts. (Rec. p. 6.)

The answer was refiled to the complaint as amended. (Rec. p. 7.)

The plaintiff then refiled his demurrer to the second and third paragraphs of the answer. (Rec. p. 7.)

The Court sustained the demurrer to the answer, to which ruling the defendant at the time excepted.

(Rec. p. 7.)

The defendant then elected to abide by said answer and refused to answer over. (Rec. p. 7.)

Thereupon the Court rendered judgment for the plaintiff in the sum of one hundred dollars, to which exception was taken by the defendant. (Rec. p. 7.)

An appeal was prayed and perfected to the Supreme Court of the State of Indiana. (Record p. 7.)

The questions in this case arise upon the rulings of the Court upon the demurrers to the complaint and the answer.

The complaint was based, as has been stated, upon a statute of the State of Indiana, requiring telegraph companies under penalty of one hundred dollars for failure, to transmit all messages, with impartiality and good faith, in the order of time in which they are received, and without postponement, and to deliver said messages by messenger to the persons to whom they are addressed, provided the person reside within one mile of the telegraph station, or reside within the town where the station is. The complaint averred that on April, 14th, 1883, at 35 minutes past 5 o'clock in the afternoon, the plaintiff delivered to the defendant, at the defendant's office in the city of Shelbyville, State of Indiana, the following telegraph message:

"April 14th, 1883.

To Rosa Pendleton,
Care of James Harker,
Near City Graveyard, Ottumwa, Iowa.

Have you shipped things? If not, don't ship. Answer quick. Wm. Pendleton."

The complaint further averred that the plaintiff paid the defendant for the transmission and delivery of said telegram from said Shelbyville, Indiana, to said Ottumwa, Iowa, but that the defendant wholly failed to deliver the same, whereby the defendant became liable for the statutory penalty of one hundred dollars.

The third paragraph of answer admits that the plaintiff delivered the telegram to the defendant for transmission, as averred in the complaint, and avers that the telegram was transmitted from said city of Shelbyville, State of Indiana, impartially and in good faith in the order of time in which it was received, and without postponement to said city of Ottumwa, in the state of Iowa; that the telegram was received in Ottumwa on the same day at 7:30 P. M., having been transmitted in its proper order without delay or negligence and in due time.

The answer then averred that the transmission and delivery of telegrams in the State of Iowa, is regulated by a special statute which is set out in the answer. The answer further avers that by the laws of the State of Iowa the defendant is not required to deliver telegrams by messenger to the persons to whom they are addressed, but that in said city of Ottumwa, defendant had established a certain district in which it does deliver telegrams by messenger, to the persons to whom they are addressed; but that the said James Harker, in whose care the telegram in suit was addressed, resided outside of said delivery district; that in accordance with the custom and usage of said Ottumwa office, a copy of said message was promptly placed in the post office of said City of Ottumwa, with the proper stamp and address upon it; that said telegram was delivered to the person to whom it was addressed at 9 o'clock A. M. on the following day, to-wit, April 15, 1883, and that in the delivery of said message, defendant's agents and employees at said city of Ottumwa complied with the laws of of the State of Iowa.

The demurrer to the answer admitted the truth of all the facts stated therein. As this cause originated in a State Court of Indiana, the existence of the statutes of the State of Iowa and the manner of compliance with them were questions of fact, and not of law, and the demurrer admitted the averments of the answer upon that subject.

As has been seen the answer specifically avers facts showing a complete compliance by the defendant in the transmission of the message with the Indiana statute, so far as the message was transmitted in and through the State of Indiana. No act or omission constituting a violation of the Indiana penal statute occured within the territorial limits of the State of Indiana. It was not until the telegram reached the territorial limits of the State of Iowa, that the act or omission occurred, upon which the plaintiff in the Court below relied, as constituting a violation of the penal statute of Indiana.

The question involved in this case is, is the Indiana statute, as applied to the facts in this case, a valid statute? Is it not void, as being in excess of the power of the State of Indiana, and as being an attempted regulation of inter-state commerce, within the meaning of the federal constitution?

Upon appeal to the Supreme Court of Indiana, the judgment of the Shelby Circuit Court was affirmed, the Supreme Court holding that the statute was valid as being within the police power of the State, and therefore not in violation of the provisions of the federal constitution touching the regulation of inter-state commerce. The court further held, that notwithstanding the act or omission relied upon as a violation of the Indiana statute, occurred within the territorial limits of the State of Iowa; that notwithstanding the statute is valid, because the contract to transmit the telegram was made in Indiana, being in effect imposed upon the parties by the Indiana statute; that the duty to transmit was continuous and was owing to the sender of the message in Indiana and as the defendant was personally within the jurisdiction of the Indiana Court, therefore the penalty would be adjuged to be due the plaintiff. The opinion of the Court appears in the record pp. 9 to 16 inclusive.

A petition was filed for the allowance of a writ of error to the Supreme Court of the United States upon the ground that the suit involved the validity of the Indiana statute, regulating the transmission and delivery of telegrams, in so far as it relates to inter-state telegrams, the question being as to whether the statute was repugnant to the federal constitution; that the decision of the Supreme Court of the State of Indiana was in favor of the validity of said statute; that there was also involved the right, privilege and immunity, as claimed by the Western Union Telegraph Company under the constitution of the United States, to transmit inter-state telegrams without restriction or interference or regulation of the same by the legislatures of the several states.

(Record pp. 16-17.)

The writ of error to this court was allowed, the citation signed and bond approved by Chief Justice, George V. Howk. (Record pp. 18-19.) The attorneys for William Pendleton acknowledged in writing service of the citation. (Record p. 20.)

ASSIGNMENT OF ERRORS.

In the Supreme Court of the United States.

The Western Union Telegraph Company.

vs.

William Pendleton.

The Western Union Telegraph Company, plaintiff in error, would show unto the Court that there is manifest error in the above and foregoing record, in this, to-wit:

1. The Supreme Court of the State of Indiana erred in affirming the judgment of the Circuit Court of Shelby county, in the State of Indiana.

2. The Court erred in overruling appellant's demurrer to appellees' amended first paragraph of complaint; to which ruling appellant at the time excepted.

3. The Court erred in sustaining appellee's demurrer to second paragraph of appellant's answer to amended first paragraph of complaint; to which ruling appellant at the time excepted.

4. The Court erred in sustaining appellees' demurrer to third paragraph of appellant's answer to amended first paragraph of complaint; to which ruling appellant at the time excepted.

5. The Court erred in rendering judgment for appellant.

Wherefore the plaintiff in error asks that said judgment of the Supreme Court of the State of Indiana may be in all things reserved.

JOSEPH E. McDONALD,
JOHN M. BUTLER,
Attorneys for Plaintiff in Error.

ARGUMENT.

The Indiana statute regulating the transmission and delivery of telegrams, so far as it is involved in this case, is as follows:

"1. Every electric telegraph company with a line of wires wholly or partly in this state, and engaged in telegraphing for the public, shall, during the usual office hours, receive dispatches, whether from other telegraphing lines or from individuals; and on payment or tender of the usual charge, according to the regulations of such company, shall transmit the same with impartiality and good faith, and in order of time in which they are received, under penalty, in case of failure to transmit, or if postponed out of such order, of one hundred dollars to be recovered by the person whose dispatch is neglected or postponed: *Provided, however*, that arrangements may be made with the publishers of newspapers for the transmission of intelligence of general and public interest out of its order, and that communications for and from officers of justice shall take precedence of all others."

Sec. 4176, R. S. Ind. 1881.

"3. Such companies shall deliver all dispatches, by messenger, to the persons to whom the same are addressed, or to their agents, on the payment of any charges due for the same: *Provided*, such persons or agents reside within one mile of the telegraphic station or within the city or town in which such station is."

Sec. 4178, R. S. Ind., 1881.

The facts in this case show that in and during the transmission of the telegram in question through the territorial limits of the State of Indiana, the above statute was complied with by the telegraph company. No act or omission, constituting a violation of this statute occurred in the State of Indiana.

The statute of the State of Iowa, upon the subject of the transmission and delivery of telegrams, is as follows:

"Any person employed in transmitting messages by telegraph must do so without unreasonable delay, and any one who willfully fails thus to transmit them, or who intentionally transmits a message erroneously, or makes known the contents of any message sent or received, to any person except him to whom it is addressed or to his agent or attorney, is guilty of a misdemeanor.

Sec. 1328 McLain's Annotated Statutes of Iowa.

"The proprietor of a telegraph is liable for all mistakes in transmitting messages made by any person in his employment, and for all damages resulting from a failure to perform any other duties required by law."

Sec. 1329, McLain's Annotated Statutes of Iowa.

The averments of the answer show that in the transmission and delivery of the message in question, the defendant complied with the above law of the State of Iowa, and did not comply with the statute of the State of Indiana. As to the transmission of the telegram through the State of Iowa, the answer does not deny nor avoid the averments of the complaint, showing a violation of the Indiana statute. In one particular the answer shows affirmatively, that the Indiana statute was not complied with by defendant's agents in the town of Ottumwa, Iowa. The Indiana law required the delivery of telegrams by messenger where the person to whom they were addressed *resided in the town* where the telegraph office, to which the message was sent, is located. James Harker resided in the town of Ottumwa, but the telegram was not delivered to him by messenger. The law of Iowa did not require it. The defendant had, it is true, established a free delivery district in the town of Ottumwa, within which it delivered telegrams by messenger. Harker resided outside of that district, and no messenger was sent to his house. He, therefore, did not receive the telegram until 9 o'clock on the following morning. The delay in the delivery of the message, and the failure to deliver by messenger, had they occurred in Indiana, would have constituted a violation of the Indiana statute.

I.

THE BUSINESS OF TELEGRAPHING FROM ONE STATE TO ANOTHER IS INTER STATE COMMERCE WITHIN THE MEANING OF THE 8TH SECTION OF THE 1ST ARTICLE OF THE CONSTITUTION OF THE UNITED STATES.

The clause of the Constitution in question, which has been frequently held by this Court to be among the most important grants of power contained in the Constitution, and conferred by it on the Federal Government, is as follows :

"The Congress shall have power * * * * to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

The question as to whether the business of transmitting telegrams from one State to another, is interstate commerce within the scope of the above constitutional provision, has already been twice before this Court.

The following extract from the last decision upon the subject states tersely the rule laid down by this Court upon the question.

"In *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, (96 U. S. 1) this Court held that the telegraph was an instrument of commerce, and that telegraph companies were subject to the regulating power of congress in respect to their foreign and inter-state business. A telegraph company occupies the same relation to commerce as a carrier of messages, that a railroad company does as a carrier of goods. Both companies are instruments of commerce, and their business is commerce itself. They do their transportation in different ways, and their liabilities are in some respects different, but they are both indispensable to those engaged to any considerable extent in commercial pursuits."

Telegraph Co. v. *Texas*, 105 U. S. 460.

2. The power of congress to regulate inter-state commerce is exclusive in all cases where the subject over which the power is exercised is in its nature national or admits of one uniform system or plan of regulation. The inaction of congress upon such a subject is equivalent to a declaration that it shall be free from all state regulation or interference.

Gloucester Ferry Co. v. *Pennsylvania*, 114 U. S. 196.

Brown v. *Huston*, 114 U. S. 622.

Pickard v. *Pullman Southern Car Co.*, 117 U. S. 34.

Wabash, St. Louis & Pacific R. R. v. *Illinois*, 118 U. S. 557.

Walling v. *Michigan,* Supreme Court Reporter, Vol. 6—454.

Corson v. *Maryland,* Supreme Court Reporter, Vol. 7—655.

Case of The State Freight Tax, 15 Wall. 332.

Cooley v. *Port Wardens*, 12 How. 299.

Gilman v. *Philadelphia*, 3 Wall. 713.

Hall v. *DeCuir*, 95 U. S. 485, on page 497.

R. R. Co. v. *Husen*, 95 U. S. 465.

III.

THE SUBJECT OVER WHICH THE POWER OF REGULATION IS ATTEMPTED TO BE EXERCISED IN THIS CASE IS IN ITS NATURE NATIONAL AND PROPERLY ADMITS ONLY OF ONE UNIFORM SYSTEM OR PLAN OF REGULATION.

The particular subject over which the power of regulation is attempted to be exercised in this case by the State of Indiana is the manner and order of transmission and delivery of telegrams within the State of Iowa, which have been sent from points within the State of Indiana.

The mere statement of such a claim of power must carry to the mind the conviction that no such power exists. If Indiana has the right to prescribe, under penalty, for failure, the manner and order of transmission and delivery, within the State of Iowa, of telegrams sent from Indiana, every other State has the same right with regard to telegrams originating within its own boundaries. The Western Union Telegraph Company is engaged in inter-state commerce. Its business is inter-state commerce. If that business is to be hampered, restricted and burdened by State legislation of this character, which attempts to impress upon a telegram, originating within the State, certain rules regulating its transmission and delivery, which follow the telegram into whatever State it may go, a conflict and confusion must arise which would be fatal to the business. The defendant's operators and agents in the State of Iowa must become involved in a hopeless confusion of rules and regulations, imposed under the guise of penal statutes. Telegrams arriving in the State of Iowa from other States would each be subject to a different rule and regulation, enforced by heavy penalties, prescribed by the State in which the telegram originated. It would be impossible to carry on the business of inter-state telegraphing, if the respective States be held to have such a power and should see fit to exercise it. Every State would seek to protect by more and more stringent legislation the rights of its own citizens. Operators and agents would find it impossible to remember or to observe the rules and regulations of the various States according to which telegrams, originating from the respective States, must be transmitted and delivered. Heavy penalties must, at every step, be incurred, in spite of the utmost good faith.

Conflicts of law would necessarily arise, to determine which, no competent tribunal could be found. The Indiana legislature has enacted this statute, which prescribes under penalty, that all telegrams shall be transmitted in the following order: First, communications for or from officers of justice; second, telegrams containing news of general interest; third, all other telegrams must be transmitted and delivered in the order in which they are received. If Indiana has the power to enact and enforce such a law in regard to inter-state telegrams then every other state has an equal right to prescribe a different order for the transmission of telegrams and to enforce it by penalties. As was said in the steamboat case of *Hall* v. *DeCuir*, 95 U. S., 485, "should state legislation in that regard conflict, then the steamer must cease to navigate between parts of the states having such conflicting legislation, or must be exposed to penalties at every trip. Those who framed the Constitution never intended that navigation, whether foreign or among the states, should be exposed to such conflicting legislation, and it was to save those who follow that pursuit, from such exposure and embarassment, that the power to regulate such commerce, among the several states, is vested exclusively in Congress." The remark above quoted may be applied with equal force to the Indiana statute, so far as it affects transmission and delivery of inter-state telegrams.

The recent cases of this Court upon the subject of inter-state commerce hereinbefore cited, uniformly hold that inter-state railroad business and the transportation by rail across the country, of freight and passengers, is a subject national in its nature, and admits only of a uniform plan of regulation. This Court has jealously guarded such inter-state commerce from the regulation by various states.

That the subject of inter-state telegraph business is one co-ordinate with railroad transportation, and equally with it, a subject national in its nature and admitting only of one uniform plan of regulation, seems to be simply common sense. Indeed this Court has already said as much. "The telegraph is an instrument of commerce, and telegraph companies are subject to the regulating power of Congress in respect to their foreign and inter-state business. A telegraph company occupies the same relation to commerce, as a carrier of messages, that a railroad company does as a carrier of goods. Both companies are instruments of commerce and their business is commerce itself * * * * * . A state statute, so far as it operates on private messages sent out of the state, is a regulation of foreign and inter-state commerce, and beyond the power of the state."

Telegraph Co. v. *Texas,* 105 U. S. p. 460 on p. 466.

What has been said above as to inevitable conflicts in law, should the power of a state to regulate by statute the order of transmission of inter-state telegrams be sustained, applies with equal force to statutes regulating the mode of delivery of telegrams. A telegram must be delivered. Without it the transmission amounts to nothing. It is easy to see that different state legislatures might differ in their enactments as to modes of delivery and enforce such rules by penalties for their violation. Indeed, in the case at bar, the Indiana legislature prescribed a mode of delivery which the Iowa legislature has by its silence impliedly declared to be unwise or unnecessary.

The life of commerce is its freedom and the states cannot be permitted in this endeavor to protect the rights of their own citizens, to burden and embarass, if not destroy, the business of inter-state telegraphing by enacting statutes attempting to regulate the order and mode of the the transmission and delivery of telegrams in other states, which telegrams have originated in their own boundaries.

It is not a question here as to the reasonableness of the statute in question. If such a statute can be enacted at all, its provisions will rest in the discretion of the state. It is idle to say that the interests of the state would prevent oppressive legislation. This precise point was adverted to by Mr. Justice Field in the case of *Gloucester Ferry Co.* v. *Pennsylvania*, 114, U. S. 196 on page 205. He said among other things:

"Those engaged in foreign and inter-state commerce are not bound to trust to its" (the state's) "moderation in that respect; they require security, and they may rely on the power of congress to prevent any inteference by the state until the act of commerce, the transporation of passengers and freight is completed."

In the case of *Wabash etc., Railway Co.* v. *Illinois*, 118 U. S. 557, above cited, the principle therein stated is so applicable to the case at bar that we quote from page 572. "It is not the railroads themselves that are regulated by this act of the Illinois legislature so much as the charges for transportation, and, in language just cited, if each one of the states through whose territories these goods are transported can fix its own rules for prices, *for modes of transit*, *for times and modes of delivery*, and all other incidents of transportation to which the word 'regulation' can be applied, it is readily seen that the embarassment upon inter-state transportation, as an element of inter-state commerce, might be too oppressive to be submitted to. 'It was,' in the language of the Court cited above, to meet just such a case that the commerce clause of the Constitution was adopted.'"

It seems apparent, from a moment's thought, that a state cannot have the power to regulate the transmission or delivery of inter-state telegrams even within its own borders. Take as an illustration the Indiana statute requiring delivery by messenger. To impose this upon telegrams coming into the state from without, is to impose a burden upon the business and is equivalent to imposing a tax upon each message. The messenger service must be paid for, either by the telegraph company or its patrons. In the case of *Gloucester Ferry Co.* v. *Pennsylvania*, *supra*, this Court expressly held, "that a tax upon receiving and landing passengers and freight is a tax upon their transportation; that is upon the commerce between the two states involved in the transportation."

The whole field of the regulation of the transmission and delivery of inter-state telegrams, should be kept free from interferences by the states, by means of statutes of the character of the one involved. This principle would dispose of this case, but a much narrower principle will also dispose of it. This case presents the question of the regulation, by a state, of the transmission and delivery of telegrams, outside of its own borders.

POLICE POWER.

The Supreme Court of Indiana saw fit to place its decision in this case upon the footing of an exercise of the police power of the state. We do not think any such claim for the extent of the police power can be found in any other reported decision. Certainly it seems contrary to fundamental principals of law.

It will be kept in mind that the act or omission alleged to constitute the violation of the Indiana penal statute occurred wholly outside of the territory of the State of Indiana, and inside of the territory of the State of Iowa.

ACTS RENDERED PENAL BY LAW ARE PENAL ONLY BECAUSE THE LAW OF THE PLACE WHERE COMMITTED MAKES THEM SO.

Rorer on Inter-state Law, p. 149, also 152.

Graham v. *Monsergh*, 22 Vt. 543.

Richardson v. *Burlington*, 33 N. J. 192.

Slack v. *Gibbs*, 14 Vt. 357.

Whitford v. *Panama*, R. R. Co. 23 N. J. 465.

Story's Conflict of Laws, Sec. 18 and 20; 3 Wheat. 336, 386; 2 Dall. 320; 13 Pet'rs 519.

Hutchinson on Carriers, Sec. 777.

Nashville etc. R. R. Co. v. *Arken*, 6 Cold. (Tenn.) 582.

Crowley v. *Panama R. R. Co.*, 30 Barb. 99.

Leonard v. *Steam etc. Co.*, 84 N. Y. 48.

Shedd v. *Moran*, 10 Brad. (Ill. App.) 618, "ALL LAWS ARE CO-EXTENSIVE AND ONLY CO-EXTENSIVE WITH THE POLITICAL JURISDICTION OF THE LAW-MAKING POWER."

McCarthy v. *Chicago etc. Ry. Co.*, 18 Kan. 46, and authorities above cited.

These authorities and many more to the same effect, to our minds, settle the question as to the police power of the State. No such power as claimed in this case exists.

The Indiana Court attempted to meet this principle by saying that after all the right of recovery did not arise out of the statute, but out of the contract or undertaking to transmit the message; that this contract or undertaking was entered into in the State of Indiana and that the duty which the company failed to perform was a duty owing in Indiana and was a duty created by an Indiana statute and arising out of an Indiana contract.

This ingenious reasoning, it seems to us, is fallacious and throws no light upon the question. We may call the obligation, enforced by the penalty, a statutory obligation or a contract obligation. It is simply calling the same thing by different names. The whole thing is based, ultimately, on the statute, and derives it validity, if it has any, from the statute.

In any event the distinction is immaterial. The subject in hand is inter-state commerce. The business of the telegraph company is inter-state commerce itself. It makes no difference whether Indiana has a statute imposing directly a regulation upon that inter-state commerce,or whether the effect of the statute is to compel the parties to enter into a contract regulating that inter-state commerce, the terms of which contract are the terms of the statute. In either event the result is the same. The attempt is made to regulate inter-state commerce, directly or indirectly, through the fiction of a contract by an Indiana statute. It amounts to the same thing in the end, and the point is, can the State of Indiana enforce its statute, prescribing a certain regulation as to the mode of transmission and delivery within the State of Iowa, of telegrams originating in Indiana? Is it within the power of a State to impose such a regulation upon inter-state commerce?

The Indiana Court illustrates its position in this case by saying: "If there be no such power, then the State cannot regulate the speed of railroad trains where the railroad line extends beyond the State, nor enact any law providing for the safety of passengers and the community." We beg leave to say that this is exactly the question which is NOT necessarily involved in this case.

The true illustration of the position taken by the Indiana Supreme Court in this case would be that of a railroad train starting from Indiana and destined for a point in Iowa. Then let the Legislature of Indiana enact a statute regulating the speed of that train, and the duties of the railroad company toward the passengers, not only while the train was running through the State of Indiana, but also while it runs through the State of Iowa. Then, reasoning by analogy, such a statute of the State of Indiana would be upheld by the Indiana Supreme Court on the ground that the train started in Indiana, that the duty was owing in Indiana, and could be enforced by the Indiana Courts *as an exer-*

cise of the police power of the state. The illustration is perfect. It shows the fallacy of the argument at a glance, and readily suggests to the mind the inevitable conflicts of law which must arise between the various States if the exercise of such a power be admitted.

We beg leave to further quote from the opinion of the Indiana Court: "If the states possess no such power it has no existence, *because by the conslusive adjudications* of the highest Court THE POLICE POWER DOES NOT RESIDE IN CONGRESS."

In this connection we beg leave to call attention to the following quotation from Cooley's Constitutional Limitations, which Mr. Justice Field made in the opinion in the case of *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S., page 196, on page 215, and which is also quoted in several other recent decisions by this Court. It is as follows:

"It is not doubted that congress has the power to go beyond the general regulations of commerce which it is accustomed to establish, and to descend to the most minute directions if it shall be deemed advisable, and that to whatever extent ground shall be covered by those directions, the exercise of State power is excluded, Congress may establish police regulations as well as the states, confining their operations to the subjects over which it is given control by the Constitution."

Cooley's Const. Lim. 732.

The whole subject of the transmission and delivery of inter-state telegrans is, it seems, a subject national in its character and admits safely of only one uniform plan of regulation. But however it may be as to the regula-